NO. 43887-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CORY STEVEN WILLIAMS,

Appellant.

BRIEF OF APPELLANT

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Assignment of Error

1. The trial court violated the defendant's right to a jury trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, when it accepted a jury waiver that the defendant did not knowingly, intelligently, and voluntarily enter.

2. Trial counsel's failure to endorse an affirmative claim of self-defense denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court violate a defendant's right to a jury trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, if it accepts a jury waiver that the defendant did not knowingly, intelligently, and voluntarily enter?

2. Does a trial counsel's failure to endorse an affirmative claim of self-defense deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when the defendant testified and claimed self-defense, and when the court would more likely than not have acquitted the defendant had that defense been endorsed?

STATEMENT OF THE CASE

Factual History

On December 19, 2011, then 18-year-old Cory S. Williams was an inmate at the Naselle Youth Camp in Pacific County serving a sentence imposed out of King County Juvenile Court on a number of felony convictions. RP 62-65; CP 29.[1] At the time the defendant was living in Cougar Lodge housing unit. *Id.* On that day a number of the other inmates in Cougar Lodge had become rowdy and disruptive, prompting the Program Manager to order everyone to their individual sleeping areas. RP 63-65. Shortly thereafter she rang the "muster bell" in order to call everyone out of their sleeping units to the common area where they were supposed to line up and receive instructions from the staff. *Id.* After muster, she sent them back to their rooms. *Id.* Within a short time another staff member reported that the defendant was upset and pacing in his sleeping area. RP 65-66.

After speaking with the defendant for a moment and seeing that he was still upset, the Cougar Lodge Program Manager decided to have the defendant shackled and taken to a quiet room. RP 65-67. The shackling was

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[1]The record on appeal includes one volume of verbatim reports containing both the August 10, 2012, hearing, as well as the August 15, 2012, jury trial and sentencing. Although the court reporter combined all three hearings into one volume of verbatim reports, she did not use continuous page numbering. As a result, the first hearing is referred to herein as "RP 8/10/12 [Page #]," while the latter hearings are referred to herein as "RP [Page #]."

standard procedure when taking an inmate to the quite room. RP 15-17. Based upon this decision, the Program Manager called for assistance from other staff members at other residence halls as the defendant is a large, strong person. RP 7-10, 34-36, 65-68. Two of the staff members who responded were Alan Gregory and Michael Ennis. *Id.* When they entered the defendant's sleeping area they both noticed that he was not wearing his shirt and that he was pacing back and forth, obviously emotionally upset. RP 10, 34-36. According to Mr. Ennis, he tried to talk the defendant into submitting to shackling but the defendant refused. *Id.* He then stated "Cory it appears as though you are prepared to fight." RP 15. According to Mr. Ennis, the defendant responded by saying "Yes, I'm going to fight, I'm not going to go down." RP 11. According to the defendant, he did refuse to follow the officer's orders but he did not threaten to fight or harm him. RP 35-36, 85-86.

At some point during this conversation, Mr. Ennis stepped forward and grabbed the defendant in a bear hug from the front. RP 41-42. Mr. Ennis's version of what happened from this point varied significantly from the defendant's version. RP 42-44, 78-83. According to Mr. Ennis, the following happened. First, he grabbed the defendant in a bear hug trying to pin his arms to his side. RP 41-42. As his did one of the defendant's hands ended up in Mr. Ennis's groin area. 42-44. The defendant then grabbed Mr.

Ennis's testicles and started squeezing, causing Mr. Ennis to yell out "He's got my balls." *Id.* According to Mr. Ennis, the defendant kept holding and squeezing for about 30 seconds until other staff members grabbed the defendant and took him to the floor with Mr. Ennis on top. *Id.*

The defendant's version of the physical confrontation was that Mr. Ennis did not grab him in a bear hug. RP 79-81. Rather, Mr. Ennis grabbed him around the neck until the defendant couldn't breath and thought he was going to pass out. RP 82-83. At the same time Mr. Ennis yelled that he was going "to fucking kill him," and "choke his little ass out if you've got to." *Id.* Although one of the defendant's hands did end up in Mr. Ennis's groin area, he did not grab Mr. Ennis by the testicles or squeeze. *Id.* Rather, he simply intentionally pushed at Mr. Ennis trying to get out of the strangulation hold. *Id.*

Right after the beginning of the physical confrontation the Program Manager came into the room, heard Mr. Ennis yell "He's got me by the balls," as well as "I'm going to kill him." RP 65-70. She responded by grabbing the defendant and pulling him away from Mr. Ennis. *Id.* The defendant did not resist. *Id.* The defendant thereafter complied with the directions from the staff. *Id.*

Procedural History

By information filed March 22, 2012, and amended on July 6, 2012, the Clark County Prosecutor charged the defendant Cory Steven Williams with one count of custodial assault under RCW 9A.36.100(1)(a), alleging that he had intentionally assaulted a staff member at a corrections institution and that the staff member was in the performance of his official duties at the time of the assault. CP 1-2, 18-19. On August 10, 2012, the prosecutor and the defense attorney appeared in court to enter a jury waive defense counsel stated that the defendant had previously signed. RP 2-5. The defendant appeared over the telephone. *Id.* The jury waiver stated as follows:

> The undersigned defendant states that:
>
> 1. I have been informed and fully understand that I have the right to have my case heard by an impartial jury selected from the county where the crime(s) is alleged to have been committed;
>
> 2. I have consulted with my lawyer regarding the decision to have my case tried by a jury or by the court;
>
> 3. I freely and voluntarily give up my right to be tried by a jury and request trial by the court.

CP 47.

Although the court did ask the defendant if he had consulted with his attorney concerning his right to a jury trial, the court did not enter into any colloquy with the defendant concerning what those rights entailed. RP 8/10/12 2-5. Rather the court simply asked the defendant if he wanted to enter the waiver. *Id.* This conversation between the court and the defendant

went as follows:

> THE COURT: Mr. Karlsvik, please cover the Waiver of Jury Trial and then if I have any questions or the Prosecutor wants me to ask any questions, I'll cover those.
>
> MR. KARLSVIK: Yes. Your Honor, the Waiver of Jury Trial which is dated today has my signature; it has Mr. William's signature. I was over at Green Hill about – about two hours ago. I was sitting in the conference room with my investigator and Mr. Williams so we went over it in person. I reviewed the Waiver of Jury Trial form with him and we discussed the – the reasoning behind doing so and the rights that he had and was giving up and we're giving up by signing the Waiver. So we had plenty of time, I believe, to talk about it and he had an opportunity to answer – to ask me any questions and I answered them so unless Mr. Williams has any further questions about that form that he signed, it's my opinion that it's a knowing, intelligent, and voluntary Waiver of Jury Trial.
>
> THE COURT: Mr. Williams, this is Judge Sullivan. Good afternoon, sir.
>
> THE DEFENDANT: Good afternoon.
>
> THE COURT: Mr. Williams, did you hear – do you agree with what your attorney just said?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Were you able to hear everything?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Thank you. You are not physically present in the courtroom today. Are you also waiving that right to be present at this hearing, because I certainly will postpone this decision and have you brought over here in person on another Friday, so are you okay with doing this over the phone?
>
> THE DEFENDANT: Yes.

THE COURT: Okay. And you signed this Waiver of Jury Trial today; is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Did you sign it only after you had enough time to review it with your attorney so you knew what in the world you were signing?

THE DEFENDANT: Yes, sir.

THE COURT: Very well.

RP 8/10/12 2-4.

At this point the state asked the court to verify the defendant's identity, which it did with the help of the defendant's attorney. RP 8/10/12 4-5. Five days after this hearing the court called this case for trial before the bench. RP 1. As far as appellate counsel can tell from the verbatim reports, the clerk's file and the minutes sheets in the clerk's file, the court did not hold an omnibus hearing in this case and the court did not enter an omnibus order. CP 1-51. Counsel can find no evidence in the record that the defendant ever declared a defense to the court whether general denial, self-defense, or any other possible defense. CP 1-51, RP 8/12/10 1-5; RP 6-127.

During the trial in this case the state called two witnesses: Allen Gregory and Michael Ennis. RP 7-32, 33-60. The defendant then called two witnesses: Janet Darcher (the Program Manager for Cougar Lodge) and the defendant. RP 61-72, 73-92. These witnesses testified to the facts contained

in the preceding factual history. *See* Factual History. In addition, during cross-examination the defendant admitted that he intentionally touched Mr. Ennis. RP 87-88. This portion of the cross-examination went as follows:

> Q. Okay. Now, at some point then he grabbed ahold of you and you at some point grabbed at him.
>
> A. Later on.
>
> Q. Okay. Do you remember when you grabbed at him which hand you used?
>
> A. Um, I think it was both.
>
> Q. Both? And you intentionally reached out to grab ahold of him?
>
> A. No, I reached out to get him away from me.
>
> Q. But that was to put your hands on him, right?
>
> A. Not in an aggressive manner.
>
> Q. Well, let me ask you it this way. When you reached to grab him, did you intentionally reach out to put – to touch Mr. Ennis?
>
> A. Yes.
>
> Q. Okay. So your intent was to physically touch Mr. Ennis?
>
> A. Yes.
>
> Q. Okay. And in that touching it was to do something to him, and you're going to say to push him off.
>
> A. Yes.
>
> Q. Okay. And did you use force to do that?

A. Not to hurt him.

Q. Did you use physical force to – did you push?

A. Yes.

RP 87-88.

Following the end of testimony the parties presented closing argument to the court. RP 92-94, 94-95, 96-98. Although the defendant's attorney did not use the term "self-defense" during closing argument, he did state the following in closing:

> My client says that he was grabbed by the head and that he was – he used the word "choked" and could not breathe and basically reflexively pushed back on him to try to get it so he wasn't going to pass out so – there's been no contradiction. There was no rebuttal as to that. I guess Mr. Ennis' testimony will stand as it was presented.
>
> But this was not an intentional assault. Yes, there was touching. There's no doubt about that. My client says there was touching but it was more of a reflexive action to push him away because he felt that he was passing out. He denies cupping his hand and squeezing on his – on Mr. Ennis' testicles. So we would ask the Court to find him not guilty of this.

RP 95.

After hearing oral argument the court found the defendant guilty as charged. RP 98-101. The court did not address the defendant's claim during his testimony that he acted in self-defense in an attempt to get Mr. Ennis away while Mr. Ennis was strangling him. *Id.* The court later entered the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On December 19, 2011 Cory S. Williams, the Defendant charged in this matter, was an inmate at the Naselle Youth Camp.

2. The Naselle Youth Camp is a juvenile corrections institution.

3. The Naselle Youth Camp is located in the State of Washington.

4. On December 19, 2011, Cory S. Williams was ordered to return to his room and subsequently became disruptive, causing Michael Ennis, a full time staff member of the Naselle Youth Camp, who was then performing his official duties, to contact Mr. Williams.

5. During the contact Mr. Williams would not comply as instructed and became physically aggressive toward Mr. Ennis. Mr. Williams intentionally touched and grabbed Mr. Ennis by the "balls" (testicles) and physically held on to them for a prolonged period of time. Mr. Alan Gregory, a supervisor at the Youth Camp, observed the assault and testified that this was for approximately 30 seconds.

6. Mr. Williams intentionally assaulted [Mr. Ennis] while [Mr. Ennis] was preforming his official duties.

7. Mr. Ennis suffered pain from Mr. William's offensive touching.

8. Mr. Williams had to be physically restrained by several additional officers to stop the offensive touching.

9. Mr. Gregory heard Mr. Ennis call out that Mr. Williams would not let go of Mr. Ennis's testicles and that Mr. Williams had to be physically restrained to stop the assault.

10. The testimony of Mr. Ennis and Mr. Gregory was credible.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this action.

2. The Court hereby concludes beyond a reasonable doubt that on December 19, 2011 Cory S. Williams, the Defendant charged in this offense, intentionally assaulted Michael Ennis.

3. The Court hereby concludes beyond a reasonable doubt that Mr. Ennis was a full-time staff member of a juvenile corrections institute who was performing his official duties.

4. The Court further concludes beyond a reasonable doubt that the acts occurred in the State of Washington.

CP 43-45.

The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 27-39, 50-51.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO A JURY TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, WHEN IT ACCEPTED A JURY WAIVER THAT THE DEFENDANT DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY ENTER.

Under the United States Constitution, Sixth Amendment every person charged with an offense that could result in over six months imprisonment is entitled to a trial by jury. *Cheff v. Schnackenberg*, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966). By contrast, Washington Constitution, Article 1, § 21, affords the citizens of this state the right to trial by jury for any offense that is defined as a "crime," conviction of which could result in any imprisonment. *Pasco v. Mace*, 98 Wn.2d 87, 653 P.2d 618 (1982). Since all persons charged with a crime have a fundamental right to trial by jury, the waiver of this right may only be sustained if "knowingly, intelligently and voluntarily made." *State v. Bugai*, 30 Wn.App. 156, 157, 632 P.2d 917 (1981).

The waiver of the right to jury trial must either be made in writing or made orally on the record. *State v. Wicke*, 91 Wn.2d 638, 591 P.2d 452 (1979). If the defendant challenges the validity of the jury waiver on appeal, the State bears the burden of proving that the waiver was knowingly, intelligently and voluntarily made. *State v. Donahue*, 76 Wn.App. 695, 697,

887 P.2d 485 (1995). Because it implicates the waiver of an important constitutional right, the appellate court reviews the waiver de novo. *State v. Vasquez*, 109 Wn.App. 310, 34 P.3d 1255 (2001). Finally, in examining an oral waiver of the right to jury made in violation of the requirement under CrR 6.1, "every reasonable presumption should be indulged against the waiver of such a right, absent an adequate record to the contrary." *State v. Wicke*, *supra*.

For example, in *State v. Williams*, 23 Wn.App. 694, 598 P.2d 731 (1979) the defendant's were convicted in a superior court bench trial de novo of illegally taking shellfish. The record contained no written waiver of jury trial and no colloquy between the defendant and the court. The defendants thereafter appealed, arguing that the state had failed to meet its burden of showing that they had knowingly, intelligently, and voluntarily waived their rights to a jury trial. The Court of Appeals agreed, holding as follows:

> *State v. Jones*, 17 Wn.App. 261, 562 P.2d 283 (1977), held that a criminal defendant's right to trial by jury is not waived unless a written waiver is filed by defendant himself. *In re Reese*, 20 Wn.App. 441, 580 P.2d 272 (1978), softened the rule in holding that an express and open waiver of jury trial in open court and appearing in the record constitutes substantial compliance with CrR 6.1(a). This interpretation was upheld by our Supreme Court following a consolidated appeal in *State v. Wicke*, *supra*. Under the present state of the law, where there is no written waiver of a jury trial, substantial compliance with CrR 6.1(a) requires some colloquy between the court and the defendant personally. The absence of such a colloquy in the record of the present case dictates reversal of the convictions.

State v. Williams, 23 Wn.App. at 697-698.

In a 2004 case, *State v. Borboa*, 124 Wn.App. 779, 102 P.3d 183 (2004), the defendant appealed his exceptional sentence, arguing that under the decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the trial court had denied him his right to jury trial when it imposed a sentence in excess of the standard range based upon judicially determined aggravating facts. In this case, a jury convicted the defendant of first degree kidnaping, second degree assault of a child, and first degree rape of a child. The jury had also returned a special finding that the defendant had committed the kidnaping with sexual motivation. Under RCW 9.94A.712, the court imposed sentences of life in prison, and then declared a minium mandatory term in excess of the applicable range based upon deliberate cruelty and particular vulnerability because of age.

While the defendant's case was on appeal, the Supreme Court issued the decision in *Blakely* and the defendant then argued that the minimum mandatory sentence in excess of the applicable range violated his right to jury trial. The state responded by arguing that even if *Blakely* applied, the defendant had waived his right to a jury determination on the aggravating factors when he admitted one of the factors in his initial brief. However, the Court of Appeals rejected this argument, holding as follows:

> Although a defendant can waive his Sixth Amendment right to

> jury trial, he or she must do so knowingly, voluntarily, and intelligently. *Borboa* was tried by a jury and sentenced before *Blakely* was decided. He did not know of or agree to forgo his right to have a jury find the facts needed to support a sentence above the standard range. Thus, he did not knowingly, voluntarily, or intelligently waive his Sixth Amendment right to have a jury find such facts.

State v. Borboa, 124 Wn.App. at 792 (footnotes omitted).

In the case at bar, the defendant was at least aware that he did have the right to trial by jury, since the written waive so states. However, the absence of any colloquy between the court and the defendant on what the right to a jury trial entailed shows that the waiver in this case was no more effective than the waiver in *Borboa*. The hearing on the jury waiver in this case does not reveal whether or not the defendant understood that under the Washington constitution, there had to be complete jury unanimity in order to enter a guilty verdict. This state constitutional right varies significantly from the United States Constitution and many other state constitutions, which do not require complete jury unanimity in order to sustain a guilty verdict. *See State v. Gimarelli*, 105 Wn.App. 370, 20 P.3d 430 (2001); *State v. Klimes*, 117 Wn.App. 758, 73 P.3d 416 (2003). Absent advise on this important component of the right to jury trial under Washington Constitution, Article 1, § 21, the state in this case cannot meet it's burden of proving that the jury waiver was knowingly, intelligently, and voluntarily made. As a result, this court should reverse the conviction and remand for a new trial before a jury.

II. TRIAL COUNSEL'S FAILURE TO ENDORSE AN AFFIRMATIVE CLAIM OF SELF-DEFENSE DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at

694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to endorse and argue a claim of self-defense. Specifically, the defendant argues that (1) trial counsel's failure to endorse this defense fell below the standard of a reasonably prudent attorney, and (2) that trial counsel's failure caused prejudice because it is more likely than not that the trial court would have acquitted the defendant had defense counsel endorsed self-defense and argued it to the court. In making this claim, the first issue presented to the court is whether or not the defendant was even entitled to have the court apply the law on self-defense. As the following explains, he was so entitled.

While due process does not guarantee every person a perfect trial, under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, due process does guarantee every person charged with a crime a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). This right to a fair trial includes the right to raise any

defense supported by the law and facts, such as self-defense or justified use of force. *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

In order to properly raise the issue of self-defense or justified use of force in the State of Washington, the record at trial need only produce "any evidence" supporting the claim that the defendant's conduct was done in self-defense. *State v. Adams*, 31 Wn.App. 393, 641 P.2d 1207 (1982). This evidence need not even raise to the level of sufficient evidence "necessary to create a reasonable doubt in the jurors' minds as to the existence of self-defense." *State v. Adams*, 31 Wn.App. at 395 (citing *State v. Roberts*, 88 Wn.2d 337, 345-46, 562 P.2d 1259 (1977)). Thus, the court may only refuse an instruction on self-defense where no plausible evidence exists in support of the claim. *Id.* A defendant's claim alone of self-defense is sufficient to require instruction on the issue. *State v. Bius*, 23 Wn.App. 807, 808, 599 P.2d 16 (1979).

In determining whether or not "any" evidence exists to justify instructing on self-defense, the court must apply a "subjective" standard. *State v. Adams*, 31 Wn.App. at 396. In other words, "the court must consider the evidence from the point of view of the defendant as conditions appeared to him at the time of the act, with his background and knowledge, and 'not by the condition as it might appear to the jury in the light of testimony before

it.'" *State v. Adams*, 31 Wn.App. at 396 (quoting *State v. Tyree*, 143 Wash. 313, 317, 255 P. 382 (1927)). In *Tyree*, the Supreme Court states the proposition as follows:

> The appellants need not have been in actual danger of great bodily harm, but they were entitled to act on appearances; and if they believed in good faith and on reasonable grounds that they were in actual danger of great bodily harm, it afterwards might develop that they were mistaken as to the extent of the danger, if they acted as reasonably and ordinarily cautious and prudent men would have done under the circumstances as they appeared to them, they were justified in defending themselves.

State v. Tyree, 143 Wash. at 317.

The court also stated:

> [T]he amount of force which (appellant) had a right to use in resisting an attack upon him was not the amount of force which the jury might say was reasonably necessary, but what under the circumstances appeared reasonably necessary to the appellant.

State v. Tyree, 143 Wash. at 316.

The decisions in *State v. Wanrow*, 88 Wn.2d 221, 559 P.2d 548 (1977) and *State v. Adams*, *supra*, also illustrate the quantum of evidence that must exist in the record before a defendant is entitled to have the court force the state to disprove self-defense beyond a reasonable doubt as part of the elements of the offense. The following examines these cases.

In *State v. Wanrow*, *supra*, the defendant was in an apartment with a woman and a man, as well as a number of small children. At some point during the evening, the man went and got the decedent, whom the other

woman believed had molested one of her children. The Supreme Court gave the following outline for the facts as they followed this point.

> It appears that Wesler, a large man who was visibly intoxicated, entered the home and when told to leave declined to do so. A good deal of shouting and confusion then arose, and a young child, asleep on the couch, awoke crying. The testimony indicates that Wesler then approached this child, stating, 'My what a cute little boy,' or words to that effect, and that the child's mother, Ms. Michel, stepped between Wesler and the child. By this time Hooper was screaming for Wesler to get out. Ms. Wanrow, a 5'4" woman who at the time had a broken leg and was using a crutch, testified that she then went to the front door to enlist the aid of Chuck Michel. She stated that she shouted for him and, upon turning around to reenter the living room, found Wesler standing directly behind her. She testified to being gravely startled by this situation and to having then shot Wesler in what amounted to a reflex action.

State v. Wanrow, 88 Wn.2d at 226.

The defendant was later charged and convicted of murder. She appealed, arguing among other things that the trial court incorrectly instructed the jury on self-defense. One of these instructions read in part as follows:

> However, when there is no reasonable ground for the person attacked to believe that *his* person is in imminent danger of death or great bodily harm, and it appears to *him* that only an ordinary battery is all that is intended, and all that *he* has reasonable grounds to fear from *his* assailant, *he* has a right to stand *his* ground and repel such threatened assault, yet *he* has no right to repel a threatened assault with naked hands, by the use of a deadly weapon in a deadly manner, unless *he* believes, a*nd has reasonable grounds* to believe, that *he* is in imminent danger of death or great bodily harm.

State v. Wanrow, 88 Wn.2d at 239 (italics in original).

In *Wanrow*, the court reversed, based in part upon this erroneous instruction. The court's comments were as follows.

> In our society women suffer from a conspicuous lack of access to training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons. Instruction No. 12 does indicate that the relative size and strength of the persons involved may be considered; however, it does not make clear that the defendant's actions are to be judged against her own subjective impressions and not those which a detached jury might determine to be objectively reasonable.

State v. Wanrow, 88 Wn.2d at 239-240 (footnote omitted).

Similarly, in *State v. Adams*, *supra*, the defendant shot and killed a burglar who, with a companion, was removing items from his neighbors unattended trailer. These items included firearms. The area in which the defendant lived was remote, and the defendant did not have a telephone. The defendant was eventually charged with murder, and convicted of a lesser included offense of manslaughter. He then appealed, arguing that the trial court erred when it refused to give an instruction on self-defense. The Court of Appeals agreed and reversed, stating as follows.

> In the case at bar, Adams [the defendant] testified that when he saw Chard and Cox jog toward the house, he thought they had come to injure him. Adams recognized Chard, who had burglarized the premises a week earlier and who had been shot at by Goard [Defendant's neighbor] during the crime. Adams stated that he expected a confrontation with Chard and Cox, so to protect himself, he fled the trailer, taking a rifle with him for his own safety. After Adams had seen Chard and Cox make a forcible entry of Goard's trailer and remove property therefrom, Adams moved his position to obtain a better idea of what was transpiring. Adams observed Cox

> running while holding port arms a shotgun which Adams knew was loaded. Adams testified that he was "very scared ... in fear of my life...." Adams knew there were other guns in the trailer. He didn't know where Chard was at that time. Cox was about 70 feet away. Adams felt a sense of duty to protect the property and to apprehend Cox, but stated that he didn't intend to shoot Cox. While in this emotional state of fear, Adams fired a shot which struck Cox in the back and caused Cox's death.
>
> Considering these circumstances and Adams' testimony-he thought Chard and Cox had come to do him harm because Goard fired a shot at Chard a week earlier, he was very scared and in fear of his life, he knew he was in a remote area after 8 p. m. with no nearby telephone, and he did not know whether he had been discovered by either burglar, nor where Chard was, nor whether Chard also had a loaded gun. A jury could have found Adams reasonably believed himself to be in imminent danger. Since the evidence could have led a reasonable jury to find self-defense, a fortiori, Adams met the lesser burden of producing "any evidence." Accordingly, the trial judge should have given a self-defense jury instruction.

State v. Adams, at 397-98.

Turning to the case at bar, the facts, seen in the light most favorable to the defense, show that on the day in question, Mr. Ennis physically attacked the defendant, put him in a choke hold and strangled him to the point that the defendant thought he was going to pass out. At the time, Mr. Ennis was yelling that he was going to "fucking kill" the defendant. While it would undoubtedly be true that the defendant as an inmate was subject to reasonable physical restraint by a staff member under the circumstances, the level of force the defendant stated he was attempting to resist went well beyond that level of physical restraint to which the law would require him to

submit. Rather, he was attempting to resist the infliction of serious bodily injury. *See e.g. State v. Holeman*, 103 Wn.2d 426, 693 P.2d 89 (1985) (an arrestee has the right to resist an attempt by an officer to inflict serious bodily injury). Under the decisions in *Wanrow* and *Adams*, the defendant's claims were more than sufficient to entitle him to the application of the law on self-defense. Thus, as to the first part of the defendant's argument on ineffective assistance, the law is clear that he was entitled to the claim had his attorney simply made it.

In this case the state may claim that trial counsel's failure to endorse a self-defense claim was a tactical decision which defeats a claim of ineffective assistance. While this argument many times has validity, it does not under the facts of this case. Indeed, a careful review of the defendant's testimony and trial counsel's arguments during closing reveals that self-defense was not only a viable defense in this case, but it was the only defense reasonably available. The following addresses this argument.

During the defendant's direct examination, he made some very specific claims about what happened. They were: (1) that Mr. Ennis grabbed him around the neck and strangled the defendant until he thought he was going to pass out, (2) that Mr. Ennis was threatening to kill the defendant while he was strangling him, (3) that he did not grab or squeeze anything on Mr. Ennis, and (4) that his only intentional physical contact with Mr. Ennis

was to try to push him away. However, it is apparent from his direct, and specifically admitted in cross-examination that the defendant did intentionally touch Mr. Ennis. This latter evidence went as follows:

> Q. Okay. Now, at some point then he grabbed ahold of you and you at some point grabbed at him.
>
> A. Later on.
>
> Q. Okay. Do you remember when you grabbed at him which hand you used?
>
> A. Um, I think it was both.
>
> Q. Both? And you intentionally reached out to grab ahold of him?
>
> A. No, I reached out to get him away from me.
>
> Q. But that was to put your hands on him, right?
>
> A. Not in an aggressive manner.
>
> Q. Well, let me ask you it this way. When you reached to grab him, did you intentionally reach out to put – to touch Mr. Ennis?
>
> A. Yes.
>
> Q. Okay. So your intent was to physically touch Mr. Ennis?
>
> A. Yes.
>
> Q. Okay. And in that touching it was to do something to him, and you're going to say to push him off.
>
> A. Yes.
>
> Q. Okay. And did you use force to do that?

A. Not to hurt him.

Q. Did you use physical force to – did you push?

A. Yes.

RP 87-88.

In spite of the defendant's admission that he did intentionally touch Mr. Ennis, but that he was only acting to prevent Mr. Ennis from strangling him, defense counsel still argued that the defendant was not guilty because there was no intentional touching. Counsel argued:

> My client says that he was grabbed by the head and that he was – he used the word "choked" and could not breathe and basically reflexively pushed back on him to try to get it so he wasn't going to pass out so – there's been no contradiction. There was no rebuttal as to that. I guess Mr. Ennis' testimony will stand as it was presented.
>
> But this was not an intentional assault. Yes, there was touching. There's no doubt about that. My client says there was touching but it was more of a reflexive action to push him away because he felt that he was passing out. He denies cupping his hand and squeezing on his – on Mr. Ennis' testicles. So we would ask the Court to find him not guilty of this.

RP 95.

Counsel's argument in the light of the defendant's testimony makes no sense at all. In fact, counsel's statements sounds like an argument in support of the defendant's claim of self-defense in spite of the fact that counsel never used the phrase "self-defense" or endorsed this defense as he should have in order to get the court to properly consider it. This failure fell

below the standard of a reasonably prudent attorney. The decision in *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987), provides an example of a case in which the court found that counsel's failure to propose an instruction that was necessary to allow the defense to argue its theory of the case did fall below the standard of a reasonably prudent attorney. The following examines this case.

In *State v. Thomas, supra*, a defendant charged with felony eluding elicited evidence that she was so intoxicated while driving that she was unable to form the requisite intent of wilfully failing to stop and driving in wanton and wilful disregard of the safety of others. In spite of the presentation of evidence on this point, defense counsel failed to propose an instruction explaining the law on diminished capacity. Following conviction, the defendant appealed, arguing that trial counsel's failure to propose such an instruction denied her effective assistance of counsel.

After reviewing the facts of the case, the court first noted that under its prior decisions, diminished capacity claim through voluntary intoxication could be used to answer a charge of felony eluding. The court stated as follows on this point:

> In [*State v.Sherman,* 98 Wn.2d 53, 653 P.2d 612 (1982)], we held that RCW 46.61.024 requires that the defendant both subjectively and objectively act with wanton and willful disregard of others. We concluded that juries should be instructed that the circumstantial evidence of defendant's manner of driving only creates

> a rebuttable inference of "wanton and wilful disregard for the lives or property of others ..." *Sherman*, at 59, 653 P.2d 612. Therefore, *Sherman* indicates that objective conduct by the defendant indicating disregard is only circumstantial evidence and may be rebutted by subjective evidence pertaining to defendant's mental state.

State v. Thomas, 109 Wn.2d at 227.

The court then went on to review evidence presented at trial, including the evidence that supported the defendant's claim that she was highly intoxicated at the time she was driving. Following this review, the court agreed with the defendant's argument. The court stated as follows concerning the question whether or not counsel's failure fell below the standard of a reasonably prudent attorney:

> Defendant is entitled to a correct statement of the law and should not have to convince the jury what the law is. Here, defendant's proposed "to convict" instruction did not indicate that there is a subjective component to RCW 46.61.024, nor did any other instruction offered by the defense. Furthermore, the record does not contain a proposed defense instruction on the relevance of intoxication as to the mental element of the crime charged. The lack of a *Sherman* instruction allowed the prosecutor to argue that Thomas' drunkenness caused her mental state. In contrast, defense counsel argued that Thomas' drunkenness negated any guilty mental state. Therefore, in closing argument, opposing counsel argued conflicting rules of law to the jury. Accordingly, we conclude that in failing to offer a Sherman instruction, defense counsel's performance was deficient.

State v. Thomas, 109 Wn.2d at 229 (citations omitted).

In *Thomas, supra*, the court found that trial counsel's failure to provide a proper instruction that correctly set out the law and thereby allowed

the defendant to effectively argue her theory of the case did fall below the standard of a reasonably prudent attorney. The same conclusion applies in the case at bar because (1) the defendant was entitled to consideration of his theory on self-defense, and (2) his theory of the case was that he acted in self-defense in all of his physical contact with Mr. Ennis. Thus, by failing to endorse and specifically argue self-defense, trial counsel denied the defendant the ability to effectively argue his theory of the case. In the same manner that trial counsel fell below the standard of a reasonably prudent attorney in *Thomas*, so in the case at bar trial counsel fell below the standard of a reasonably prudent attorney.

In this case trial counsel's failure also caused the defendant prejudice. The reason is that in this case there was a significant amount of evidence to support the defendant's claims beyond his own testimony. First, Mr. Ennis himself admitted that he had threatened to kill the defendant. Second, although Mr. Ennis yelled out that the defendant had grabbed his testicles, those present did not see that defendant take this action. Third, Mr. Ennis was apparently so incensed with the defendant that Ms Darcher had to pull him off of the defendant. Fourth, the defendant did not resist Ms Darcher after she helped others pull the defendant and Mr. Ennis apart. Fifth, since the defendant did present sufficient evidence to have the court consider self-defense, had trial counsel properly endorsed the claim, the court would have

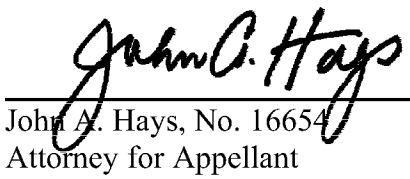
had to find the absence of self-defense beyond a reasonable doubt in order to convict the defendant. Under the facts in the case at bar, it is highly likely that the court would not have found such an absence beyond a reasonable doubt. Thus, the court would more likely than not have acquitted the defendant had the defense attorney properly endorsed a claim of self-defense. As a result, trial counsel's failure denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment and the defendant is entitled to a new trial.

CONCLUSION

The trial counsel violated the defendant's right to jury trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, when it accepted a jury waiver that the defendant did not knowingly, voluntarily, and intelligently enter. In addition, defense counsel's failure to endorse a claim of self-defense denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As a result, this court should vacate the defendant's conviction and remand for a new trial.

DATED this 26th day of April, 2013.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 21

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

WASHINGTON CONSTITUTION
ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION,
SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, **Respondent,**	**NO. 12-1-00049-1** **COURT OF APPEALS NO:43887-9 -II**
vs.	**AFFIRMATION OF SERVICE**
Cory Steven Williams, **Appellant.**	

STATE OF WASHINGTON)
) **ss.**
COUNTY OF THURSTON)

DONNA BAKER, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On **April 30th, 2013**, I personally placed in the mail and/or E-Filed the following documents

1. BRIEF OF APPELLANT

to the following:

MR. DAVID BURKE
PACIFIC CO. PROSECUTING ATTY.
P.O. BOX 45
SOUTH BEND, WA 98586

MR. CORY WILLIAMS
DOC # 840700
GREENHILL SCHOOL
SPRUCE LIVING AREA
375 SW 11TH St.
CHEHALIS, WA. 98532

Dated this 30TH day of APRIL, 2013 at LONGVIEW, Washington.

/S/_____
DONNA BAKER
LEGAL ASSISTANT TO JOHN A. HAYS

HAYS LAW OFFICE

April 30, 2013 - 9:34 AM

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,**	**COURT OF APPEALS NO: 43887-9-II**
vs.	**AFFIRMATION OF SERVICE AMENDED (As to Appellant's Name)**
Cory Steven Williams, **Appellant.**	

STATE OF WASHINGTON)
) : **ss.**
County of Pacific)

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On **April 30th, 2013**, the following documents were placed in the mail:

1. BRIEF OF APPELLANT
2. AFFIRMATION OF SERVICE

to the following:

DAVID BURKE
PACIFIC CO PROSECUTING ATTY
P.O. BOX 45
SOUTH BEND, WA 98586

CORY WILLIAMS
GREENHILL SCHOOL
SPRUCE LIVING AREA
375 SW 11TH STREET
CHEHALIS, WA 98532

Dated this 1ST day of May, 2013 at LONGVIEW, Washington.

/s/
CATHY RUSSELL
LEGAL ASSISTANT TO JOHN A. HAYS

John A. Hays
Attorney at Law
1402 Broadway
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HAYS LAW OFFICE

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